Supreme Court, U.S.
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No. 96 70

In The

Supreme Court of the United States

October Term, 1995

COLUMBIA MACHINE, INC.,

Petitioner,

vs.

HERMAN E. SCHNIDRIG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Ninth Circuit Court of Appeals created a new standard for the granting of a summary judgment motion in an employment discrimination case that conflicts with the Supreme Court decision in *Celotex*, as well as numerous circuit court of appeal decisions, by holding that evidence of discriminatory remarks, regardless of their connection to the employment decision, necessarily creates a genuine issue of fact.

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PETITION FOR WRIT OF CERTIORARI

Columbia Machine, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 11, 1996, in order to resolve the conflict between the Ninth Circuit Court of Appeals and the Supreme Court and several other Circuit Courts of Appeal on the important issue presented herein.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, which is reported, appears in Appendix A.

JURISDICTION

The Ninth Circuit entered its opinion and judgment on April 11, 1996. Petitioner filed its Petition for Writ of Certiorari within ninety days of the Notice of Entry of Judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, *et. seq.*, provides that it is unlawful for an

employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age." § 623(a)(1).

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This case arises from the decision by Columbia Machine, Inc. ("Columbia") to hire someone other than Plaintiff, Herman E. Schnidrig ("Schnidrig"), as President of the Company. Schnidrig asserts that Columbia refused to offer him the position of president because of his age in violation of the Age Discrimination in Employment Act ("ADEA"). At the time of his application, Schnidrig was acting as the general manager and vice president of operations for Columbia.

After filing his original complaint, Plaintiff resigned and filed an amended complaint asserting a claim for wrongful constructive discharge because of his age and in retaliation for his complaint about perceived age discrimination.

On March 12, 1993, Columbia moved for summary judgment on all claims. By order dated August 10, 1993, the U. S. District Court for the District of Oregon granted Columbia's motion. In doing so, the District Court concluded there was no evidence that the decision-maker, an individual employed by an executive search firm, considered age in selecting candidates for the position of president. (Schnidrig was not among the candidates selected

due to his inferior qualifications.) Furthermore, the District Court found that comments made by members of the Board of Directors of the Company alleged to have been direct evidence of discrimination were "stray remarks" with no connection to the employment decision.

An appeal from the decision of the District Court was filed by Schnidrig, with the Equal Employment Opportunity Commission appearing by amicus brief on behalf of the Plaintiff. The Ninth Circuit Court of Appeals reversed the District Court's granting of summary judgment on the claim of age discrimination and affirmed the District Court's dismissal of Schnidrig's claim of constructive discharge. In reversing the District Court on the age discrimination claim, the Ninth Circuit relied upon allegations of direct evidence of discrimination that were in no way attributed to the decision-maker. The Court of Appeals concluded that the allegations themselves, without determining their relationship to the decision-maker, were sufficient to overcome Columbia's motion for summary judgment. Columbia has filed this Petition for Writ of Certiorari on the basis that the Ninth Circuit's approach is in conflict with other Circuit Courts of Appeals, as well as well-settled Supreme Court precedent.

B. Statement of the Facts

For the purposes of this petition, the facts as set forth by the Court of Appeals in its opinion are taken as true. See Appendix A. Those facts pertinent to the petition are as follows:

Columbia is a closely held Washington Corporation owned by the Neth family. Fred Neth, Sr., is the majority shareholder, chairman of the Board of Directors, and chief executive officer of Columbia. The Board consisted of six directors: Fred Neth, Sr.; three of his children, Fred Neth Jr., Dorothy Osadchuk, and one other daughter, Bill Wells, a long time employee; and Joe Barclay, president of the Cascade Corporation.

Schnidrig, who was born in 1930, began working for Columbia as a production manager in 1980. In 1981, he was promoted to vice-president of manufacturing. In February of 1991, the president of the company, Tom Neth, resigned under pressure. Schnidrig was asked to take over the responsibilities of Tom Neth and run the company as general manager/vice-president of operations while the Board searched for a new president.

Schnidrig alleges, and we accept as true for purposes of summary judgment, that as early as June of 1991, Bill Wells told Schnidrig that during a Board of Directors meeting, Joe Barclay voiced the opinion that Columbia needed a president in the 45-50 year old range and that other directors agreed. In addition, the affidavit of Robert Showman, the manager of cost accounting, states that in the Fall of 1991, Bill Wells told him the Board was not considering Schnidrig because they wanted someone in his or her mid to late forties. Schnidrig also presented the shorthand notes of the minutes of a Board meeting held on February 25, 1992. The notes indicate during discussion regarding the preparation of materials to be sent to the executive search firm, Joe Barclay stated "they should

send a copy of job description, maximum compensation level, only perk, company car, age 45-50 years, and past experience with long-term potential." Bill Wells omitted the reference to an age requirement from the final draft of the minutes.

On February 12, 1992, Schnidrig sent a memo to Fred Neth, Sr. indicating he was interested in the president's position. Schnidrig alleges that on February 19, Fred Neth, Sr. told him Joe Barclay wanted a younger man for the job and that his daughters were leaning that way as well. Schnidrig also alleges that on February 27, Fred Neth, Sr. admitted the Board discussed wanting somebody younger as the new president.

In March of 1992, the Board hired Ronald Goerss of the recruiting firm Smith, Goerss, & Ferneborg, to conduct a nationwide search for a new president and to present candidates for the position to the Board. The Board agreed the president would be selected from the candidates submitted by Goerss. The Board gave Goerss a list of six minimum qualification requirements for the position. The list included four general requirements: 1) strong work ethic; 2) warm, friendly personality; 3) effective communication skills; and 4) team leadership. In addition, the list contained two specific requirements:

> (1) a minimum of 5 years broad general management experience and proven track record with a medium sized company or a division of a larger firm engaged in the design, manufacture and sale of industrial machinery and equipment; and

> (2) strong operations (manufacturing) background with a thorough working knowledge of accounting and financial reporting.

Goerss indicated he relied solely on the criteria given him by the Board and that he was never instructed to, nor did he consider age in making his decisions.

Schnidrig alleges that on May 8, he again asked Fred Neth, Sr. why he could not be president of Columbia and was again told the Board was looking for somebody younger.

In June of 1992, Goerss completed his search, including interviews of all three Columbia vice-presidents, and submitted a list of five candidates to the Board. All five candidates were from outside the company. The Board interviewed two of the five candidates and, in July, entered into negotiations with Gerald O'Meara to be the president of Columbia.

Also in July, Schnidrig again applied for the position of president and alleges he was again told the Board was looking for somebody younger in the 45-50 year old range. Thereafter, Schnidrig filed his first complaint with the EEOC.

On October 8, 1992, O'Meara accepted Columbia's offer and agreed to begin work on November 2, 1992. Schnidrig resigned on October 27, 1992.

Schnidrig filed suit against Columbia claiming that he was denied the promotion to president because of his age, and that he was constructively discharged in retaliation for filing a complaint with the EEOC. The district court

granted summary judgment in favor of Columbia on all claims.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Opinion Directly Conflicts with the Supreme Court's Ruling in *Celotex* and Several Other Circuit Court of Appeal Decisions Concerning the Treatment of Direct Evidence of Discrimination

The Ninth Circuit proclaimed that it requires very little evidence to survive summary judgment in an employment discrimination case and closed the door on Columbia's motion by finding that alleged comments made by members of the Board of Directors of the Company and particularly Fred Neth, Sr., created an issue of fact. According to the Ninth Circuit's opinion, the District Court erred in granting Columbia's summary judgment motion because it "prematurely" resolved the issue of whether the Board member's comments had been sufficiently insulated from the decision-making process. Appendix A-11. The Ninth Circuit effectively ruled that where an individual has alleged direct or circumstantial evidence of discrimination, summary judgment is necessarily defeated and the question of the relationship of the evidence to the decision-making process should go to the jury.

The Ninth Circuit approach is at odds with the Supreme Court decision in *Celotex v. Catrett*, 477 U.S. 317 (1986), and numerous Circuit Court decisions. In *Celotex*, the Supreme Court held that summary judgment is appropriate where "the pleadings, depositions, answers

to interrogatories, and admissions on file, together with affidavits, if any, say that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* at 322-23. In responding to a motion for summary judgment, it is incumbent upon a plaintiff to come forward with evidence sufficient to show the existence of a genuine issue regarding a material fact. *Id.* Where direct evidence of employment discrimination has been alleged, it is well-settled that the relationship between the remark and the decisional process is a material fact.[1] *Weisbrot v. Medical College of Wisconsin*, 70 FEP 763, 769 (7th Cir. 1996); *Armbruster v. Unisys Corp.*, 65 FEP 828 (3rd Cir. 1994); *Radabaugh v. Zip Feed Mills*, 62 FEP 438 (8th Cir. 1993) and *Mauter v. The Hardy Corporation*, 825 F.2d 1554 (11th Cir. 1987). Nevertheless, the Ninth Circuit rejected this established principle and, instead, created a new standard that requires plaintiffs to simply allege the existence of discriminatory remarks without considering whether they are material to the decision-making process.

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[1] Justice O'Conner commented as follows with respect to discriminatory remarks:

> Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-69, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986), cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecision-makers, or statements by decision-makers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989).

The Eleventh Circuit Court of Appeal utilizes a different approach to considering direct evidence of discrimination presented by a plaintiff in response to a motion for summary judgment. In *Mauter, supra,* a 60-year-old plumber estimator was terminated when his employer ceased operations of the department for which he worked. In response to Mauter's lawsuit, The Hardy Corporation ("THC") filed a motion for summary judgment offering significant economic reasons for closing the plumbing department. Rather than disputing the articulated explanation for his dismissal, Mauter chose to present direct evidence of discrimination by alleging that a vice president of THC (who retired during the year Mauter was terminated) indicated he had grounds for the lawsuit because "The Hardy Corporation was going to weed out all of the old ones." *Id.* at 1558.

Although Mauter's allegation may have been sufficient to overcome a summary judgment motion according to the Ninth Circuit opinion herein, the Eleventh Circuit affirmed the granting of summary judgment because there was no evidence submitted to establish that the vice president played any part in the decision to terminate the plaintiff. Accordingly, the Eleventh Circuit held that the "plaintiff did not controvert the defendant's proof by setting forth specific facts showing that there is a genuine issue whether age was a substantial factor in THC's decision." *Id.* at 1558.

Similarly, Schnidrig chose to offer direct evidence of discriminatory motives in the form of statements made by Directors and notes taken during Board meetings. Schnidrig did not challenge Columbia's assertions that Gerald O'Meara was more qualified for the job, nor did

Schnidrig prove that he had possessed the requisite qualifications for the job. Despite Schnidrig's sole reliance on the alleged remarks and notes, he presented no evidence to establish that Ronald Goerss of the executive search firm was ever told to consider age or that he considered age in selecting the candidates. In the Eleventh Circuit, Schnidrig's failure to submit evidence raising a genuine issue regarding the decision-maker's motives would result in a dismissal of his case, yet according to the Ninth Circuit, such an analysis is premature and should be left to the jury.

The Ninth Circuit's approach is also in conflict with the Seventh Circuit's decision in *Weisbrot v. Medical College of Wisconsin, supra,* and the Third Circuit Court of Appeal in *Armbruster v. Unisys Corp., supra.* In *Weisbrot,* the Seventh Circuit succinctly stated:

> A slur is not in and of itself proof of actionable discrimination, even if repeated. The remark taken to be a slur may have been innocent or misunderstood, or it may have had no consequence, either because it did not reflect the thinking of the people with decision-making authority or because it did not motivate even the person uttering it to act on it.

Id. at 769, quoting *Shager v. Upjohn,* 913 F.2d 398 (7th Cir. 1990) (noting that "the favorable connotations that cluster around the term 'young men' are too tepid to create, in themselves, a triable issue of age discrimination"). In *Armbruster,* the Third Circuit refused to consider an official's statement that the company could not afford to keep employees over 50-years-old who were earning over $50,000 per year as direct evidence of discrimination

where there was no evidence connecting the official's statement to any decision-maker involved with the plaintiff's termination. *Armbruster*, 65 FEP at 836. *See also, Radabaugh v. Zip Feed Mills, supra,* (the plaintiff must present "evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the fact-finder to infer that that attitude was more likely than not a motivating factor in the employer's decision." *Id.* at 441, quoting *Ostrowski v. Atlantic Mutual Insurance Company*, 968 F.2d 171, 182 (2d Cir. 1992).

The Ninth Circuit's ruling creates an unfair burden for employers. An employee who is unhappy with a management decision affecting his or her employment can require an employer to incur the substantial expense of trial and face the possibility of an adverse jury verdict simply by filing a discrimination lawsuit against his employer and alleging statements were made that show management's intent to discriminate. According to the Ninth Circuit, an employee may do this regardless of how meritorious and non-discriminatory the employer's reasons for the decision were. There will be no procedure in the Ninth Circuit to dismiss ungrounded claims of discrimination short of trial where an employer makes a decision affecting his or her employees based entirely on merit or other non-pretextual reasons. Considering the increasing number of employment discrimination lawsuits being brought in the courts of this country, this conflict among the Circuit Courts of Appeals needs to be resolved.

CONCLUSION

The Ninth Circuit's decision has created a conflict among the circuits regarding an essential element of proof a plaintiff must establish in order to proceed with a case of employment discrimination. Petitioner has located no other decision of a Circuit Court of Appeal holding that it is premature to consider the relationship between alleged discriminatory remarks and the decisional process at the summary judgment stage of litigation. Accordingly, it is respectfully requested that the Petition for Writ of Certiorari be granted and the split in the circuits regarding "stray remarks" be resolved.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERMAN E. SCHNIDRIG, *Plaintiff-Appellant,* v. COLUMBIA MACHINE, INC. a Washington corporation, *Defendant-Appellee.*	No. 93-35770 D.C. No. CV-92-001304-MFM **OPINION**

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
January 12, 1995 – Portland, Oregon
Submission Vacated January 23, 1995
Resubmitted April 4, 1996

Filed April 11, 1996

Before: Harry Pregerson and Stephen S. Trott,
Circuit Judges, and James M. Fitzgerald,* District Judge.

Opinion by Judge Trott

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* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

COUNSEL

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Robert J. Gregory, Attorney, Equal Employment Opportunity Commission, Washington, D.C., amicus curiae.

Douglas S. McDowell, Ann Elizabeth Reesman, McGuiness & Williams, Washington, D.C., Attorneys for Equal Employment Advisory Council, amicus curiae.

OPINION

TROTT, Circuit Judge:

Herman Schnidrig appeals the district court's grant of summary judgment in favor of Columbia Machine, Inc. ("Columbia") in Schnidrig's Age Discrimination in Employment Act ("ADEA") action alleging Columbia improperly denied him a promotion because of his age and constructively discharged him. We review the district court's grant of summary judgment de novo, *Jesinger v.*

Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994), and reverse.

I

FACTS AND PROCEDURAL HISTORY

Columbia is a closely held Washington Corporation owned by the Neth family. Fred Neth, Sr., is the majority shareholder, chairman of the Board of Directors, and chief executive officer of Columbia. The Board consisted of six directors: Fred Neth, Sr.; three of his children, Fred Neth Jr., Dorothy Osadchuk, and one other daughter; Bill Wells, a long time employee; and Joe Barclay, president of the Cascade Corporation.

Schnidrig, who was born in 1930, began working for Columbia as a production manager in 1980. In 1981, he was promoted to vice-president of manufacturing. In February of 1991, the president of the company, Tom Neth, resigned under pressure. Schnidrig was asked to take over the responsibilities of Tom Neth and run the company as general manager/vice-president of operations while the Board searched for a new president.

Schnidrig alleges, and we accept as true for purposes of summary judgment, that as early as June of 1991, Bill Wells told Schnidrig that during a Board of Directors meeting, Joe Barclay voiced the opinion that Columbia needed a president in the 45-50 year old range and that other directors agreed. In addition, the affidavit of Robert Showman, the manager of cost accounting, states that in the Fall of 1991, Bill Wells told him the Board was not considering Schnidrig because they wanted someone in

his or her mid to late forties. Schnidrig also presented the shorthand notes of the minutes of a Board meeting held on February 25, 1992. The notes indicate during discussion regarding the preparation of materials to be sent to the executive search firm, Joe Barclay stated "they should send a copy of job description, maximum compensation level, only perk, company car, age 45-50 years, and past experience with long-term potential." Bill Wells omitted the reference to an age requirement from the final draft of the minutes.

On February 12, 1992, Schnidrig sent a memo to Fred Neth, Sr. indicating he was interested in the president's position. Schnidrig alleges that on February 19, Fred Neth, Sr. told him Joe Barclay wanted a younger man for the job and that his daughters were leaning that way as well. Schnidrig also alleges that on February 27, Fred Neth, Sr. admitted the Board discussed wanting somebody younger as the new president.

In March of 1992, the Board hired Ronald Goerss of the recruiting firm Smith, Goerss, & Ferneborg, to conduct a nationwide search for a new president and to present candidates for the position to the Board. The Board agreed the president would be selected from the candidates submitted by Goerss. The Board gave Goerss a list of six minimum qualification requirements for the position. The list included four general requirements: 1) strong work ethic; 2) warm, friendly personality; 3) effective communication skills; and 4) team leadership. In addition, the list contained two specific requirements:

> (1) a minimum of 5 years broad general management experience and proven track record with a medium sized company or a division of a

larger firm engaged in the design, manufacture and sale of industrial machinery and equipment; and

(2) strong operations (manufacturing) background with a thorough working knowledge of accounting and financial reporting.

Goerss indicated he relied solely on the criteria given him by the Board and that he was never instructed to, nor did he consider age in making his decisions.

Schnidrig alleges that on May 8, he again asked Fred Neth, Sr. why he could not be president of Columbia and was again told the Board was looking for somebody younger.

In June of 1992, Goerss completed his search, including interviews of all three Columbia vice-presidents, and submitted a list of five candidates to the Board. All five candidates were from outside the company. The Board interviewed two of the five candidates and, in July, entered into negotiations with Gerald O'Meara to be the president of Columbia.

Also in July, Schnidrig again applied for the position of president and alleges he was again told the Board was looking for somebody younger in the 45-50 year old range. Thereafter, Schnidrig filed his first complaint with the EEOC. Schnidrig claims that from this point on his work environment deteriorated. Particularly, Schnidrig complains Robin Popple, another Columbia vice-president, was given a raise so that he earned more than Schnidrig; he was excluded from a lunch meeting with the officers of First Interstate Bank; company executives

and other personnel were instructed not to talk to Schnidrig about various matters including corporate finances; and he was moved out of his office and given a much smaller office.

On October 8, 1992, O'Meara accepted Columbia's offer and agreed to begin work on November 2, 1992. Schnidrig resigned on October 27, 1992.

Schnidrig filed suit against Columbia claiming that he was denied the promotion to president because of his age, and that he was constructively discharged in retaliation for filing a complaint with the EEOC. The district court granted summary judgment in favor of Columbia on all claims.

II

AGE DISCRIMINATION

The allocation of burdens and order of presentation of proof for claims of discrimination arising under the ADEA follow three steps:

> [A] plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994) (quoting *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1986)).

"The prima facie case may be based either on a presumption arising from the factors such as those set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), or by more direct evidence of discriminatory intent." *Wallis*, 26 F.3d at 889 (citing *Lowe*, 775 F.2d at 1009). Furthermore, "[w]hen a plaintiff does not rely exclusively on the presumption but seeks to establish a prima facie case through the submission of actual evidence, very little such evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a factfinder." *Lowe*, 775 F.2d at 1009.

In this case, Schnidrig clearly established a prima facie case of age discrimination. Schnidrig did not attempt to establish the factors giving rise to a presumption of discrimination. Rather, Schnidrig offered direct evidence of discriminatory motives in the form of statements made by directors and notes taken during Board meetings.

Columbia argues that whether Schnidrig chooses to establish a prima facie case through a presumption or through direct evidence of discrimination, he must still show that he is qualified for the job. This argument is premature. Schnidrig established a prima facie case that he was treated differently on the basis of his age. Therefore, Schnidrig's qualifications are irrelevant to the existence of the prima facie case of discrimination. The burden shifts to Columbia to articulate nondiscriminatory motives regardless of Schnidrig's qualifications.

Columbia offered three nondiscriminatory reasons why it chose not to promote Schnidrig: 1) Schnidrig was eliminated as a candidate for the position by Goerss who did not include Schnidrig's name in the list of qualified candidates which he presented to the Board, therefore, it was not the Board's decision not to promote Schnidrig; 2) Schnidrig was not qualified for the job; and, 3) O'Meara was more qualified for the job than was Schnidrig.

The district court found that Columbia produced evidence to support its claim that O'Meara met the qualifications of the job profile and that Schnidrig did not. This was sufficient to shift the burden back to Schnidrig to show that Columbia's reasons for not promoting him were pretextual. Thus, the issue before this Court is whether Schnidrig produced sufficient evidence to raise a genuine issue of fact as to whether Columbia's proffered reasons were pretextual. "If a rational trier of fact could, on all the evidence, find that the employer's action was taken for impermissibly discriminatory reasons, summary judgment for the defense is inappropriate." *Wallis*, 26 F.3d at 889.

Schnidrig presented the following allegations and evidence to show discriminatory intent by Columbia: 1) Allegation that Bill Wells told Schnidrig that during a Board meeting in June of 1991, Joe Barclay expressed wanting a president in the 45-50 year old range; 2) Affidavit of Robert Showman, manager of cost accounting, stating that following a Board meeting in the fall of 1991, Bill Wells told Showman the Board was not seriously considering Schnidrig for president because they wanted someone in his or her mid to late forties; 3) Allegation that on February 19, 1992, Fred Neth, Sr. told Schnidrig

some of the directors wanted a younger man as president; 4) Shorthand notes of the minutes of the Board meeting on February 25, 1992, indicating Joe Barclay that the requirement of being 45-50 years old be included in the job profile for president; 5) Allegation that on February 27, 1992, Fred Neth, Sr. admitted the Board discussed wanting somebody younger as the new president; 6) Allegation that on May 8, 1992, Fred Neth, Sr. again told Schnidrig the Board wanted somebody younger; and 7) Allegation that in July of 1992, Fred Neth, Sr. again told Schnidrig the Board was looking for somebody younger to be president.

This Court has set a high standard for the granting of summary judgment in employment discrimination cases. Most recently, we explained that " '[w]e require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is one that can only be resolved through a "searching inquiry" – one that is most appropriately conducted by the factfinder, upon a full record.' " *Lam v. University of Hawaii*, 40 F.3d 1551, 1563 (9th Cir. 1994) (quoting *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991)).

> "[W]hen a plaintiff has established a prima facie inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will *necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision." . . . When [the] evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost

> always exist with respect to any claim of a non-discriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment.

Sischo-Nownejad, 934 F.2d at 1111 (quoting *Lowe*, 775 F.2d at 1009). *Cf. Wallis*, 26 F.3d at 890 ("[W]hen evidence to refute defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal *prima facie* case based on a *McDonnell Douglas* type presumption."); *FDIC v. Henderson*, 940 F.2d 465, 473 n. 16 (9th Cir. 1991) ("However, *Lowe* was subsequently amended to indicate that the Court did not mean to 'prevent the summary disposition of meritless suits but simply ensure that when a material fact exists a civil rights litigant will not be denied a trial on the merits.' ").

The district court, in granting summary judgment, emphasized that Schnidrig was eliminated as a candidate for president by Ronald Goerss of the executive search firm hired by Columbia and not by the Board. The district court found there was no evidence Goerss was ever told to consider age and that he never considered age in selecting candidates for the Board's consideration. The district court concluded the comments made by Fred Neth, Sr., were attenuated from the decision-making process, and therefore, were merely "stray remarks" with no connection to the employment decision.

The Ninth Circuit authority relied on by the district court is distinguishable. In *Merrick v. Farmers Ins. Group*, 892 F.2d 1434 (9th Cir. 1990), an executive for Farmers made one comment that he chose one candidate over

another because he was " 'a bright, intelligent, knowledgable young man.' " *Id.* at 1438. Similarly, in *Nesbitt v. Pepsico, Inc.* 994 F.2d 703 (9th Cir. 1993), a supervisor commented during a meeting that " '[w]e don't necessarily like grey hair.' " *Id.* at 705. The court found this "comment was uttered in an ambivalent manner and was not tied directly to Nesbitt's termination." *Id.*

Contrasting, in the instant case, Schnidrig alleges that on three separate occasions, when he asked to be considered for president, he was told the Board wanted somebody younger for the job. Significantly, at least one of these instances occurred after Goerss had submitted his list of candidates to the Board. Furthermore, Schnidrig did more than offer mere allegations of discriminatory intent; he produced evidence in the form of shorthand notes taken at the February 25, 1992, Board meeting and the affidavit of a coworker.

Although it is possible that Columbia sufficiently insulated the decision-making process from the discriminatory remarks of the directors, in light of the reluctance of this Circuit to allow summary judgment where there is direct or circumstantial evidence of discriminatory intent, the district court was premature in resolving this issue on summary judgment. Whether Columbia relied on impermissible factors in refusing to promote Schnidrig is a question appropriately answered by a trier of fact.

III

CONSTRUCTIVE DISCHARGE

Schnidrig also contends Columbia constructively discharged him by making working conditions so intolerable

that he felt forced to resign. Specifically, Schnidrig submitted six factors which, taken together, were designed to humiliate him and force him to resign: 1) He was replaced as head of the company by a man fifteen years younger than him; 2) Columbia did not give him a new position; 3) Another vice-president was given a pay raise so that he was earning more than Schnidrig; 4) He was forced to move out of his office and into a much smaller office; 5) He was excluded from a lunch meeting with officers from First Interstate Bank; and 6) Other executives were told not to speak to him about financial or other matters.

To establish a claim for constructive discharge, Schnidrig "must show there are triable issues of fact as to whether 'a reasonable person in [his] position would have felt that [he] was forced to quit because of intolerable and discriminatory working conditions.' " *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994) (quoting *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989)).

> Whether working conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question for the jury. In general, however, a single isolated incident is insufficient as a matter of law to support a finding of constructive discharge. Thus, a plaintiff alleging a constructive discharge must show some aggravating factors, such as a continuous pattern of discriminatory treatment.

Sanchez v. City of Santa Ana, 915 F.2d 424, 431 (9th Cir. 1990) (internal quotations and citations omitted), *cert. denied*, 112 S.Ct. 66 (1991).

Schnidrig was not demoted, did not receive a cut in pay, was not encouraged to resign or retire, and was not disciplined. Accepting all of Schnidrig's allegations as true, his working conditions were not so intolerable and discriminatory that a reasonable person would feel forced to resign. Additionally, Columbia offered legitimate non-discriminatory reasons for each of the actions complained of by Schnidrig.

The district court correctly found no evidence to suggest either that any of these actions were motivated to force Schnidrig to resign or that they made Schnidrig's working conditions intolerable. Therefore, the district court's grant of summary judgment for Columbia on the claim of wrongful constructive discharge is affirmed.

IV

AFTER-ACQUIRED EVIDENCE

Columbia argues that even if this Court should find a genuine issue of material fact as to whether Schnidrig was denied the promotion for improper reasons, summary judgment is still appropriate because after Schnidrig resigned, Columbia discovered a legitimate nondiscriminatory reason for which Schnidrig would have been discharged. Columbia claims it later learned Schnidrig copied and removed confidential and personnel documents without authorization in violation of the terms of Columbia's employee handbook.

The Supreme Court recently held that the use of after-acquired evidence of wrongdoing by an employee that would have resulted in their termination as a bar to all relief for an employer's earlier act of discrimination is inconsistent with the purpose of the ADEA. *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 884 (1995); *see also O'Day v. McDonnell Douglas Helicopter Co.*, ___F.3d___, ___ (9th Cir. 1996), No. 92-15625, slip op. filed March 26, 1996 ("[I]f an employer discharges an employee for a discriminatory reason, later-discovered evidence that the employee could have been discharged for a legitimate reason does not immunize the employer from liability."). Therefore, although Columbia's discovery of after-acquired evidence may bear upon the specific remedy to be ordered, it does not warrant the granting of summary judgment.

V

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of Columbia on Schnidrig's claim of constructive discharge is affirmed. We reverse the district court's grant of summary judgment in favor of Columbia on Schnidrig's claim of age discrimination and remand that issue to the district court for a trial on the merits.

AFFIRMED in part; REVERSED and REMANDED in part.

Each party shall bear its own costs of this appeal.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

COLUMBIA MACHINE, INC.,

Petitioner,

vs.

HERMAN E. SCHNIDRIG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HERMAN E. SCHNIDRIG, Plaintiff, v. COLUMBIA MACHINE INC., Defendant.	)	Civil No. 92-1304-MA OPINION (Filed Aug. 10, 1993)

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MARSH, Judge.

Plaintiff originally filed this action against his employer under the Age Discrimination Act, 29 U.S.C. § 623(a)(1), alleging that he was denied a promotion because of his age. At that time, plaintiff was acting as the general manager of the corporation, had applied for the position of company president, and was informed that the company had hired an outside candidate who was approximately 10 years younger than plaintiff. One week after filing his original complaint, plaintiff resigned and filed an amended complaint asserting two additional claims for common law wrongful discharge on the basis

that he had been constructively discharged because of his age and in retaliation for complaints about perceived age discrimination. Defendant now seeks summary judgment against the denial of promotion claim on grounds that plaintiff failed to meet the minimum qualification requirements developed by the Board of Directors and because he fails to produce evidence raising an inference of discrimination. Defendant seeks summary judgment against plaintiff's two wrongful constructive discharge claims arguing that plaintiff has failed to produce sufficient evidence that he was "discharged," due to "intolerable" working conditions. For the reasons which follow, defendant's motion is granted.

STANDARDS

Summary judgment is appropriate if the court finds that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There is no genuine issue of material fact where the nonmoving party fails "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

All reasonable doubts as to the existence of genuine issues of fact must be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valadingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences can be

drawn, summary judgment is inappropriate. *Sankovich v. Ins. Co. of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

BACKGROUND

Defendant is a Washington corporation in the business of designing, manufacturing and selling concrete block making and palletizing equipment. Defendant is a closely held corporation owned by the Neth family. Fred Neth, Sr., is the chairman of the Board of Directors and the majority shareholder and his two daughters and son, Fred Jr., are also members of the board. At the age of 50, plaintiff began working for defendant as a production manager in 1980. In 1981, plaintiff was promoted to vice-president of manufacturing – one of three vice-president positions within the company at that time.

In February of 1991, Tom Neth, the company's 38 year old president, resigned. Plaintiff contends that Tom Neth resigned under pressure due to substance abuse problems and his unauthorized use of company expense accounts, while one of the board members, Dorothy Osadchuk, would only indicate that the Board was dissatisfied with Tom Neth's "attendance record" and lack of "maturity." Regardless of the reasons underlying his resignation, Tom Neth left abruptly and plaintiff was "promoted" as an interim "general manager," and "vice-president of operations" while the Board began its search for a new president.[1] Fred Neth, Jr. was then made vice-

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[1] Apparently the "general manager" designation was a new one – the original organization has Fred Neth, Sr. at the top as CEO, with the president, Tom Neth immediately below him, and

president of manufacturing, with Robin Popple continuing to act as vice-president of marketing and Larry Morrow held the position of vice-president of finance.

The Board of Directors began the process of locating and hiring a president by first developing a list of minimum qualifications and a job description. This list included such general items as a "strong work ethic," a "warm, friendly personality," "effective communication skills," and "team leadership," as well as two specific requirements:

> (1) a minimum of 5 years broad general management experience and proven track record with a medium sized company or a division of a larger firm engaged in the design, manufacture and sale of industrial machinery or equipment; and
>
> (2) strong operations (manufacturing) background with a thorough working knowledge of accounting and financial reporting.

On December 17, 1991, the Board authorized a nationwide search for candidates and decided to hire an executive search firm. In March of 1992, the Board hired Ronald Goerss of the firm of Smith, Goerss & Ferneborg to search for and present candidates meeting the Board's job profile and minimum qualifications.

In a letter dated February 12, 1992 and on numerous other occasions, plaintiff informed the Board that he was interested in the president's position. However, in several

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three vice-presidents below Tom Neth. Although plaintiff was not referred to as the "president," his role as "general manager" is above the vice-president in the organizational chart.

meetings with Fred Neth Sr., plaintiff contends that he was told that the Board was looking for a younger candidate. In her shorthand notes from a Board meeting which took place on February 25, 1992, Irene Shropshire indicated that Joe Barclay, an outside Board member, said: "they should send a copy of job description, maximum compensation level, one perk, company car, age 45-50 years, and past experience with long-term potential." The age qualification was not included within the formal typewritten meeting notes. Dorothy Osadchuck, another board member, indicates in her deposition that she recalled that age was discussed in relation to the new president, but it was in the context that a candidate would "probably have to be in their 40s to have the experience," required by the Board's job profile.

Ronald Goerss solicited applications nationwide and indicates that he was instructed "to give due consideration to any qualified employees of Columbia." Goerss interviewed all three Columbia vice-presidents, including plaintiff, and submitted five candidates to the Board for its consideration. Goerss explained that he did not select plaintiff as a candidate because he did not meet the minimum qualifications established by the Board – he lacked both the five years of general management experience with a manufacturing company and lacked the thorough working knowledge of accounting and financial reporting. Goerss indicates that he relied solely upon the Board's job profile criteria to select candidates and that he was never instructed to, nor did he consider age in making his selections.

The Board interviewed two of the five candidates presented by Goerss.[2] In July of 1992, the Board offered the president's position to Gerry O'Meara who was 46 years old at the time. Thereafter, plaintiff filed his first complaint with the EEOC while continuing in his position as the interim general manager and vice-president of operations. After filing his complaint, plaintiff and Larry Morrow, vice-president of finance, were asked not to attend a meeting with a bank representative. Robin Popple, vice-president of marketing was given a pay raise which then exceeded plaintiff's rate of pay.[3]

On October 8, 1992, O'Meara accepted the Board's offer. Fred Neth, Sr. decided that the new president should be given his corner office in the executive suite and each of the executives was moved to accommodate this shift. In the process, plaintiff was moved to a smaller office and his former office was given to Popple. Plaintiff contends that he was told by several employees that their supervisors had instructed them not to talk to him, but admits that he continued to communicate with other

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[2] The other candidate interviewed was Roger Faganni who was 45 years old at the time.

[3] Plaintiff intimates that Popple was a "subordinate" who was given a "promotion." However, prior to plaintiff's appointment as the interim general manager, Popple and plaintiff were both vice-presidents and on the same organizational level for different departments. Further, the record reveals that Popple independently sought and negotiated the pay raise with the Board. Prior to Popple's pay raise, plaintiff received the highest salary of any vice-president. There is no evidence in the record that any other vice-president sought or received a raise, nor is there any evidence that plaintiff ever asked for a raise in pay.

employees. After learning of O'Meara's selection, plaintiff contends that no one told him what position he would hold when O'Meara came on board and that it would be left to O'Meara. Plaintiff did not stay long enough to find out his fate, but resigned effective October 27, 1992 with O'Meara beginning work in November of 1992.

Following his resignation, defendant discovered that plaintiff had taken confidential documents from personnel files and from the desks of other employees and copied them without authorization in violation of company policy. Defendant claims that, had it known of this activity, it would have terminated plaintiff.

DISCUSSION

a. Failure to Promote

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621, *et seq.*, provides that it is unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age." § 623(a)(1). Protection under the act extends to all individuals who are at least 40 years old. § 631(a).

A plaintiff alleging discrimination under the ADEA may rely upon two alternative theories: disparate treatment or disparate impact. *Rose v. Wells Fargo*, 902 F.2d 1417, 1421 (9th Cir. 1990). In this case, plaintiff relies upon the disparate treatment theory. Therefore, to establish a *prima facie* case of age discrimination in the failure

to promote context, plaintiff must produce enough evidence to permit the trier of fact to infer that: (1) he is a member of the protected class; (2) he applied for a position for which he was qualified; and (3) a younger person with similar qualifications received the position. *Cotton v. City of Alameda*, 812 F.2d 1245, 1248 (9th Cir. 1987). The initial burden imposed upon the plaintiff is not meant to be "onerous" and need only "suggest" that the challenged decision was based on age. *Rose*, 902 F.2d at 1421, n.1, *citing Diaz v. American Tel. & Tel.*, 752 F.2d 1356, 1361 (9th Cir. 1985).

If the plaintiff establishes a *prima facie* case, the burden then shifts to the employer to produce evidence that it had legitimate non-discriminatory reasons for its decision. *Id.* If the employer satisfies this burden, the burden of production shifts back to the plaintiff to establish that the defendant's proffered reasons are pretextual. *Id.* Although the burden of production shifts, the burden of persuasion remains with the plaintiff at all times. *Id., citing Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). For the purposes of avoiding summary judgment, plaintiff need only "tender a genuine issue of material fact as to pretext." *Cotton*, 812 F.2d at 1248. A plaintiff may demonstrate pretext in two ways: either by "directly persuading the court that a discriminatory reason more likely motivated the employer," or by showing that the employer's proffered reason is "unworthy of credence." *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1437 (9th Cir. 1990).

In this case, there is no dispute that plaintiff is a member of the protected class, nor is there any dispute that plaintiff was performing his job in a satisfactory

manner. Defendant contends, however, that plaintiff was not qualified for the position given the job profile criteria created by the Board. Plaintiff concedes that he lacks the 5 years of management experience and the background in accounting and finance. There is also no dispute that O'Meara met both qualifications. Further, plaintiff does not dispute that these are legitimate job-related criteria. Instead, plaintiff claims that he was nevertheless "qualified," because he had successfully been running the company for 18 months prior to his resignation.

The fact that the plaintiff was capable of running the company as the general manager and vice-president of operations does not necessarily mean that he was qualified for the president's position. A plaintiff's opinions of his own qualifications has little probative value. *Schuler v. Chronicle Broadcasting*, 793 F.2d 1010, 1011 (9th Cir. 1986). Further, plaintiff's argument misses the mark because the question is not whether plaintiff was the best qualified candidate in the abstract, but whether plaintiff was more qualified than O'Meara with respect to defendant's chosen criteria. *Cotton*, 812 F.2d at 1249. As the Ninth Circuit has emphasized, "[t]he ADEA does not make it unlawful for an employer to do a poor job of selecting employees. It merely makes it unlawful to discriminate on the basis of age." *Id.* Thus, unless the selection criteria has a disparate impact on a protected class of employees, courts are generally not permitted to "second guess" selection criteria. *Id.* In this case, if the selection criteria had a disparate impact on any "class" of employees it would have affected *younger* workers given the types and minimum years of experience requested.

Plaintiff's only disagreement with the Board's selection criteria is that it is "vague." I disagree, but to the extent that several criteria involved a degree of subjectivity, I note that subjective criteria should be examined with a higher level of scrutiny because it may be susceptible to discriminatory abuse. However, the use of subjective criteria is less suspect in cases involving higher level employment for which skills are necessarily measured in a subjective manner. *Nanty v. Barrows*, 660 F.2d 1327, 1334 (9th Cir. 1981). In order to show that the use of these criteria was improper, plaintiff must show that their use was arbitrary. *Casillas v. United States Navy*, 735 F.2d 338, 344 (9th Cir. 1984). To rebut a claim if arbitrariness, the employer need not show that the criteria used were necessary to performance of the job, only that they were legitimately related to the job. *Id.* Plaintiff offers nothing to show that significant management, financial and accounting experience would not be helpful in performing the job as Columbia's president. Thus, plaintiff fails to show that these alleged "vague" requirements were arbitrary and therefore pretextual.

Based upon the foregoing, I find that plaintiff was not "qualified" for the President's position given the legitimate, non-discriminatory criteria created by the Board for use by the outside consulting agency, and, thus, he fails to establish a *prima facie* case of discrimination under the ADEA. However, I am cognizant of the fact that the guidelines for establishing a *prima facie* case of discrimination are flexible and that the case may nevertheless proceed if there is enough evidence to raise an inference of intentional discrimination.

Evidence demonstrating that the employee hired for the position was more qualified than the plaintiff is sufficient to meet the employer's burden of producing a legitimate reason for refusing to hire the plaintiff. *Parsons v. County of Del Norte*, 728 F.2d 1234, 1239 (9th Cir. 1984), *cert. denied*, 469 U.S. 846 (1984). Defendant has produced evidence that O'Meara met the qualifications of its job profile while plaintiff did not. Accordingly, defendant has met its burden of production.

Since the defendant has articulated a valid, non-discriminatory reason for not promoting plaintiff, the burden shifts back to the plaintiff to offer evidence that the reason given is a pretext for discrimination. Although disputed, plaintiff has produced evidence that the defendant's CEO, Fred Neth, Sr., told him on several occasions that the Board would not consider him for the President's position because they wanted someone "younger."[4]

Assuming the truth of plaintiff's assertions, if the outside consulting agency had selected plaintiff as one of the candidates it recommended to the Board, then I would indeed find that plaintiff had produced sufficient evidence to create a material issue of fact regarding defendant's potentially discriminatory motives. However, by hiring the outside consulting firm to narrow the field and select candidates for the Board's consideration, any discriminatory comments made by Fred Neth, Sr. to the plaintiff become attenuated from the decision-making

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[4] In addition, plaintiff relies upon several double and triple hearsay statements that others told him that the Board would not consider him because it was looking for a "younger" candidate.

process absent some evidence that such discriminatory motives were communicated to the consulting firm.[5] There is no evidence in the record that Goerss was ever told to consider age or that he ever considered age in selecting candidates for the Board's consideration.

Although Fred Neth Sr. was ultimately involved in the final decision-making process, he was not involved in the process which eliminated plaintiff from the field of candidates.[6] Statements made by a person who is not part of the decision-making process at issue are considered "stray remarks." *Merrick*, 892 F.2d at 1438-39; *Skagen v. Sears*, 910 F.2d 1498, 1499 (7th Cir. 1990); *see also Atkin v. Lincoln Property*, 991 F.2d 268, 272 (5th Cir. 1993) (vague, remote remarks about age insufficient to support jury verdict); *Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989) (comments unrelated to decisional process insufficient to demonstrate decision based upon impermissible motives); *Mauter v. The Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987) (affirming summary judgment for employer despite vice-president's statement that company was going to 'weed out

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[5] Effective "attenuation" only works one way – an employer generally may not insulate itself from liability by delegating a hiring decision to someone who engages in discriminatory practice. *Powers v. Alabama Dept. of Educ.*, 854 F.2d 1285, 1295 (11th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989). Thus, had Goerss impermissibly relied upon age in selecting candidates for the Board's consideration, defendant could not escape liability.

[6] In his deposition, plaintiff indicated that the last age related comment Fred Neth, Sr. made to him was on July 12, 1992 because shortly thereafter, Neth suffered several strokes and began radiation treatment "so he wasn't around much after that."

the old ones,' in part, because vice-president played no role in decision to terminate plaintiff); and *Butler v. Portland General Electric*, 748 F. Supp. 783, 792 (D. Or. 1990), *aff'd* 958 F.2d 377 (1992); *compare Radabaugh v. Zip Feed Mills*, ___ F.2d ___, 1993 WL 239918 (8th Cir. July 6, 1993) (corporate planning documents emphasizing "youth" were sufficient to establish jury question where documents' author was also decision-maker). In essence, there must be a connection between the remark and the challenged adverse employment decision. *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993).

Based on the foregoing, I find that plaintiff has also failed to produce sufficient evidence to raise an inference of age discrimination to demonstrate that defendant's proffered non-discriminatory reasons for hiring O'Meara were pretextual.

b. Constructive Discharge

Plaintiff argues that, following O'Meara's selection, he was effectively forced to resign because of his age and in retaliation for filing a claim with the EEOC regarding defendant's failure to offer him the President's position. In support of his claim, plaintiff points to the fact that after the Board announced O'Meara's selection: (1) plaintiff was moved to a smaller office; (2) Popple, another vice-president, was given a raise; (3) plaintiff was excluded from a meeting with a banking representative; and (4) other employees were told by their supervisors not to talk to plaintiff, although they didn't follow this directive. Defendant denies that plaintiff was "discharged" and further, denies that any of its actions

following the announcement of O'Meara's selection were motivated by discriminatory intent.

The amended complaint and pretrial order failed to specify the legal basis for plaintiff's wrongful constructive discharge claims. Defendant initially argued, without objection, that Washington law should apply. Upon further questioning from the court, plaintiff agreed that Washington is the state with the most significant contacts with the case, but nevertheless argued that Oregon law should govern. Both Oregon and Washington have recognized the "tort" of wrongful constructive discharge in certain limited circumstances as an exception to the general rule that employment is "at-will." *Sheets v. Knight*, 308 Or. 220, 228 (1990); *Bratcher v. Sky Chefs, Inc.*, 308 Or. 501 (1989); *Farnam v. CRISTA Ministries*, 116 Wash.2d 659, 807 P.2d 830, 834 (1991).[7] Washington has not specifically recognized the tort of wrongful constructive discharge based upon age, but has noted the possibility. *See Douchette v. Bethel School Dist. No. 403*, 117 Wash. App. 824, 795 P.2d 162, 164 n.1 (1990) (dismissing action for failure to file within statute of limitations). Oregon also has not specifically addressed the tort in the age context, but has recognized the tort of wrongful constructive discharge in the context of an allegation of retaliation following formal

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[7] The four categories of "wrongful" reasons for termination generally recognized by Washington courts include terminations – either direct or constructive – based upon an employees' (1) refusal to commit an illegal act; (2) exercise of a public duty; (3) exercise of a legislative right or privilege; or (4) whistle blowing activity *if* the employee is seeking to further a public good and not merely a private or proprietary interest. *Farnam*, 807 P.2d at 834.

complaints of sexual and racial discrimination. *Seitz v. Albina Human Resources Center*, 100 Or. App. 665, 674 (1990). Thus, for the purposes of this motion, I have assumed that both Oregon and Washington would recognize the tort of wrongful constructive discharge based upon age or retaliation for an EEOC filing regarding age discrimination and, further, that both states would look to federal precedent for guidance.

The doctrine of "wrongful constructive discharge," is well established in federal employment law as a means of recognizing that there may be instances in which an employer doesn't actually terminate an employee but instead, tells the employee to "resign or be fired," or makes the conditions of employment so intolerable so as to effectively force the employee to resign for impermissible discriminatory reasons. *See e.g. Sanchez v. City of Santa Ana*, 915 F.2d 424, 431 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 66 (1991); and *Thomas v. Douglas*, 877 F.2d 1428 (9th Cir. 1989).

Whether a "constructive discharge" exists must be examined under the totality of the circumstances and the test applied is an objective one, that is whether a reasonable person in plaintiff's position would have felt forced to resign. *Sanchez*, 915 F.2d at 431.[8] Generally, whether

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[8] Although I doubt the application of Oregon law to this action, I note that Oregon standards differ from the federal in that a plaintiff need only prove that he or she felt forced to resign (a subjective test). *Bratcher*, 308 Or. at 506. However, the employee must still come forward with evidence that the employer created "unacceptable" working conditions with the intent (subjective) of forcing the employee to resign. *Id.*

working conditions have risen to an "intolerable level" is a factual question for the jury. *Id.* However, a single "isolated" incident may fail as a matter of law to support a claim of constructive discharge. *Id.; see also Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987); and *Skagen*, 910 F.2d at 1501 (rejecting argument that summary judgment is never appropriate in age discrimination cases).

Generally, courts look for evidence of either "aggravating circumstances" or a "continuous pattern of discriminatory treatment," to support a constructive discharge claim. *See e.g., Sanchez*, 915 F.2d at 431 (employer removed plaintiff's merit pay, gave plaintiff negative evaluations and rebuffed plaintiff's repeated attempts to invoke the City's grievance procedure); *Samarzia v. Clark County*, 859 F.2d 88 (9th Cir. 1988), *amended*, 866 F.2d 1185 (9th Cir. 1989) (younger employees with less seniority selected over plaintiff, co-workers referred to plaintiff as "senile" and sent him a memo with "retire now," circled); *Watson*, 823 F.2d at 360-361 (following interracial marriage, plaintiff was written up for a violation when other similarly situated employees were not, received negative performance reviews for first time and supervisor called her a derogatory name and threatened her with a demotion if she did not resign); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47 (6th Cir. 1985) (8-level demotion to a position involving heavy lifting sufficient to support pretext claim); *Stamey v. Southern Bell Tel. & Tel. Co.*, 859 F.2d 855, 860 (11th Cir.), 867 F.2d 1431, *cert. denied*, 490 U.S. 1116 (1989) (replacement was at plaintiff's desk doing her work before plaintiff had notified employer of her decision regarding early retirement);

Seitz, 100 Or. App. at 674-75 (unsatisfactory evaluation inconsistent with prior work history, plus reduction in pay); *compare McCann v. Litton Systems, Inc.*, 986 F.2d 946 (5th Cir. 1993) (transfer with a 12% pay cut and reduction in support staff insufficient to demonstrate constructive discharge); *Shealy v. Winston*, 929 F.2d 1009 (4th Cir. 1991) (upholding summary judgment for employer where chief magistrate offered demotion or retirement). Subjective, personal discomfort is insufficient to sustain a wrongful discharge claim. *Thomas*, 877 F.2d at 1434.

In this case, plaintiff was not demoted, he did not receive a pay-cut, he was not asked or encouraged to resign or accept early retirement, he was not disciplined, nor was he harassed in such a way that he would have been unable to perform his job duties. The effect of O'Meara's assumption of the presidency and what plaintiff's new job title and/or responsibilities would have been is purely speculative since plaintiff resigned prior to O'Meara's arrival. There is no evidence in the record that the Board or any other employee at Columbia wanted plaintiff to resign or encouraged him to do so nor is there any evidence in the record to show that any member of the Board ever expressed any dissatisfaction with plaintiff's job performance following his complaint to the EEOC.

There is no dispute that plaintiff was moved to a smaller office, that Popple received a pay raise and that plaintiff and another vice-president (Larry Morrow) were excluded from a meeting with the company's bank representative. There is also no dispute that defendant instructed employees not to discuss plaintiff's pending

EEOC complaint, but that plaintiff otherwise communicated with employees as usual. I find no evidence that some or all of these actions were somehow motivated to force plaintiff to resign, but note that the activities span less than a one month period and, even in combination, are not so intolerable that a reasonable person in plaintiff's position would have felt forced to resign.

Based on the foregoing, I find that plaintiff's claims of wrongful constructive discharge based upon his age or in retaliation for filing an EEOC complaint fail because he has not produced sufficient evidence that he was "discharged." There is no evidence of discrimination regarding his active job duties, nor is there sufficient evidence to create a jury question as to whether his workings conditions were "intolerable."

CONCLUSION

Based on the foregoing, I find that plaintiff has failed to establish a *prima facie* of age discrimination under the ADEA or constructive discharge under common law.[9] Accordingly, defendant's motion for summary judgment #18 is granted and its motion to strike #35 is moot.

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[9] Based on my findings, I need not reach defendant's alternative claim that plaintiff could not prove damages because defendant would have terminated him had it known that plaintiff copied and removed confidential and personnel documents without authorization.

DATED this 10 day of August, 1993.

/s/ Malcolm F. March
Malcolm F. Marsh
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HERMAN E. SCHNIDRIG, Plaintiff, v. COLUMBIA MACHINE INC., Defendant.	)	Civil No. 92-1304-MA ORDER (Filed Aug. 10, 1993)

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Attorneys for Defendant

MARSH, Judge.

In accordance with my opinion filed on this date, defendant's motion for summary judgment #18 is GRANTED and its motion to strike #35 is MOOT.

IT IS SO ORDERED.

DATED this 10 day of August, 1993.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HERMAN E. SCHNIDRIG, Plaintiff, v. COLUMBIA MACHINE INC., Defendant.	)	Civil No. 92-1304-MA JUDGMENT (Filed Aug. 10, 1993)

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Attorneys for Plaintiff

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Vancouver, WA 98660

Attorneys for Defendant

MARSH, Judge.

Based on the record, this action is dismissed.

DATED this 10 day of August, 1993.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

(3)

Supreme Court, U.S.
FILED
OCT 7 1996
CLERK

No. 96-70

In The

Supreme Court of the United States

October Term, 1996

COLUMBIA MACHINE, INC.,

Petitioner,

vs.

HERMAN E. SCHNIDRIG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Procedural Background

Columbia Machine, Inc. ("Columbia") filed its original Petition for Writ of Certiorari on July 10, 1996, requesting review of a judgment and opinion of the United States Court of Appeals for the Ninth Circuit concerning the standard for summary judgment in an employment discrimination case as it relates to "stray remarks." Respondent, Herman E. Schnidrig ("Schnidrig"), timely filed a brief in opposition to Columbia's petition for writ of certiorari. Columbia now respectfully requests that this Honorable Court consider the following reply to Schnidrig's brief in opposition.

Argument

In Schnidrig's opposition, he argues that the Ninth Circuit Court of Appeals properly reversed the granting of summary judgment by relying upon numerous stray remarks creating an inference that age played a role in the decision-making process. Schnidrig asserts the stray remarks themselves raised the inference that the decision-making process may have been tainted and that an issue of fact exists regarding their connection to the decision maker, the executive search firm of Smith, Goerss and Ferneborg. On this basis, Schnidrig disputes that the Ninth Circuit never reached the question of the relationship between the remarks and the decision-making process. Schnidrig makes this argument despite the fact that the Ninth Circuit specifically indicated that it was "premature" to resolve the issue. Appendix A to Petition for Writ of Certiorari, A-12.

As support for this theory and Schnidrig's interpretation of the Ninth Circuit opinion, Schnidrig argues the stray remarks permit an inference that he was denied the position even before the executive search firm was retained and that "but for" the discriminatory intent of the Board of Directors the executive search firm would not have been hired. The fallacy of Schnidrig's argument is simple: in order to withstand summary judgment a plaintiff must present evidence, not conclusions and assumptions, that create a genuine issue of material fact. Schnidrig's belief that the discriminatory intent of the Board of Directors resulted in the hiring of the executive search firm is pure speculation and conjecture. In fact, at no time prior to the filing of the opposition brief has Schnidrig argued or submitted any evidence showing that there would have been no need for an executive search firm had the Board of Directors not harbored discriminatory motives.

Despite the conclusory assertions of Schnidrig, there is no question that he has failed to refute the undisputed evidence offered by Columbia concerning the executive search firm's role in the hiring of a new President. The affidavit of Mr. Ronald G. Goerss, an individual who played a significant part in the process of locating qualified individuals for the position, states that he would not have accepted the assignment from Columbia if age had been one of the qualifying factors for the position. Furthermore, and contrary to the contentions of Schnidrig, Goerss states that he was instructed by the Board to give consideration to any qualified employees of Columbia for the position, including Schnidrig. Indeed, Schnidrig was not only considered for the position but was interviewed

along with three other Columbia employees. It is uncontroverted that Schnidrig was not selected as a qualified candidate because he did not meet the minimum qualifications for the position. See Affidavit of Ronald G. Goerss, attached hereto as Appendix A, that was submitted to the District Court in support of Petitioner's Motion for Summary Judgment (Record at 56-59). Moreover, Mr. Goerss's uncontradicted affidavit demonstrates that any alleged remarks by members of the Board were not considered by his firm in selecting the candidates for the position.

Schnidrig offers no evidence that any of the alleged discriminatory remarks played any part in the executive search firm's decision to eliminate Schnidrig from the list of qualified candidates. To the contrary, there is no evidence or inference that anyone on the Columbia Board had anything to do with the decision-making process that Schnidrig complains of. The Ninth Circuit's failure to reach this crucial element of Schnidrig's claim because of the possible existence of remarks by individuals who played no role in the selection of the qualified candidates is a departure from standards applied in other United

States Circuit Courts of Appeals and demonstrates the need for the granting of a writ.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HERMAN E. SCHNIDRIG, Plaintiff, vs. COLUMBIA MACHINE, INC., A Washington Corporation, Defendant.	Civil No. CV 92-1304 MA AFFIDAVIT OF RONALD G. GOERSS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA)
: ss.
County of San Francisco)

RONALD G. GOERSS, states on oath:

1. I am over the age of eighteen and competent to testify in this action. This affidavit is based upon my personal knowledge of the matters herein.

2. I am a principal of Smith, Goerss & Ferneborg, 388 Market Street, Suite 860, San Francisco, California, an executive search consulting firm. During March 1992, the Board of Directors of Defendant, Columbia Machine, Inc.

("Columbia"), hired our firm to search for qualified candidates for a new President and Chief Executive Officer ("President") for Columbia. We agreed to provide a list of the most qualified candidates to the Board for final decision.

3. Columbia's Board provided me with the minimum qualifications for the President position. Attached to this affidavit as Exhibit "A" is a copy of the document sent to me by Columbia which lists the minimum qualifications for the President position. No Board member, officer, employee or person associated with Columbia ever communicated or inferred in any way that the age of the candidates was a qualification or factor for consideration in selecting the new President. We would not have accepted this assignment if age had been a consideration.

4. We solicited applications for the Columbia President position nationwide. However, I was instructed to give due consideration to any qualified employees of Columbia for the position. At the Board's request, I interviewed three Columbia employees, including Plaintiff. Columbia provided me with a copy of a memorandum from Plaintiff to Fred Neth, Chairman of Columbia's Board, outlining Plaintiff's qualifications for the President position. Attached to this affidavit as Exhibit "B" is a copy of the memorandum.

5. Upon completion of our search, we gave Columbia's Board the identity and summary of the qualifications of five candidates who were the most qualified for the President position. All five of the finalists met or exceeded the minimum qualifications set by Columbia's Board. The Board interviewed two of the most qualified

candidates and offered the position to Gerry B. O'Meara, who accepted and is currently Columbia's President. A copy of our summary of Mr. O'Meara's qualifications is attached to this affidavit as Exhibit "C".

6. We did not select Plaintiff as one of the most qualified candidates for Columbia's President position because he did not meet the minimum qualifications for the position. Plaintiff lacked the minimum of five years of general management experience with a manufacturing company and did not appear to have as thorough a working knowledge of accounting and financial reporting as the candidate selected.

7. In my opinion Mr. O'Meara is highly qualified to be Columbia's President and is a significantly superior candidate when compared to Plaintiff. Mr. O'Meara has been a Division President of a large corporation and has over ten years of general management experience. Also, Mr. O'Meara has a strong manufacturing operations background and a good working knowledge of accounting and financial reporting.

8. I never considered the age of any of the candidates in making my recommendations to Columbia for the President position.

/s/ Ronald G. Goerss
RONALD G. GOERSS

SUBSCRIBED AND SWORN to before me on March ___, 1993.

(SEAL) OFFICIAL SEAL
FATIMA C. BRAZIL
NOTARY PUBLIC –
CALIFORNIA
SANTA CLARA COUNTY
My Comm. Expires
Nov. 1, 1993

/s/ Fatima C. Brazil
NOTARY PUBLIC
FOR CALIFORNIA
My Commission
Expires: 1-1-93